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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 21

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

WESTINGHOUSE ELECTRIC CORPORATION

On Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of April 1, 1963 (R. 78), inviting the Solicitor General to file a brief expressing the views of the United States.

STATUTE INVOLVED

The pertinent sections of the Labor Management Relations Act, 1947, Act of June 23, 1947, 61 Stat. 136-162, 29 U.S.C. 151 *et seq.*, are set forth in the Appendix, *infra*, pp. 37-40.

QUESTION PRESENTED

Whether the jurisdiction of a State court under Section 301 of the Labor Management Relations Act to enforce the arbitration provisions of a collective bargaining agreement includes power to compel arbitration of a grievance alleging that the employer has violated the agreement by assigning certain employees and work within the bargaining unit covered by the agreement to another bargaining unit, and by refusing to apply the terms and provisions of the agreement to those employees and that work.

STATEMENT

This is a suit to compel arbitration pursuant to the terms of a collective bargaining agreement between the petitioner union (IUE) and the respondent Company, Westinghouse. The agreement, a so-called "National Agreement," covered employees at various plants of the Company, including one in Baltimore, Md., where this dispute arose. (R. 7-8, 77.) The agreement contains a provision whereby the Company agrees to recognize IUE, in conjunction with its Locals, for those units for which IUE or its Locals were certified by the National Labor Relations Board as exclusive bargaining representative. An appendix to the agreement, listing the units for which IUE had been certified as of the date of the agreement, includes a unit defined as "All production and maintenance employees of the Employer at its Baltimore works . . . but excluding all salaried technical . . . employees." (R. 13.)[1] The agreement also contains a grievance procedure and pro-

[1] This unit definition was taken, *in haec verba*, from the Board's 1955 certification of IUE for a production and maintenance unit at the Company's Baltimore plant (R. 28).

vides for arbitration of unresolved grievances, including those involving "interpretation, application or claimed violation of a provision of this Agreement" (R. 8-12).

In March 1958, the IUE filed a grievance, in accordance with the contract procedure, asserting that employees doing certain work in the engineering laboratory at the Baltimore plant "should be in the IUE, Local 130 bargaining unit" (R. 41).[2] The employees in the engineering laboratory were represented by another union, "Federation,"[3] which had been certified by the Board for a unit of "All salaried, technical . . . employees . . . but excluding . . . all production and maintenance . . . employees" (R. 30). The IUE's position, as more fully developed subsequent to the filing of the grievance, was that the employees in question were performing production and maintenance work which fell within its unit; that indeed some of the work had been transferred out of that unit; and accordingly, that respondent's refusal to apply the terms of its contract with IUE to the employees and the work constituted a violation, *inter alia,* of the recognition clause of the contract and of the unit description in the appendix thereto. (R. 12-14, 35-36.) The parties could not resolve the grievance, and the

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[2] The grievance, *in toto*, read as follows (R. 41):

> The Union contends that the employees working on induction heating and are performing assembly and wiring; power brake operations; machining operations; and attending to the tool crib and storeroom operations should be in the IUE, Local 130 bargaining unit.

[3] Association of Westinghouse Salaried Employees, X-ray and Industrial Electronics Division, an affiliate of the Federation of Westinghouse Industrial Salaried Unions.

Company refused to arbitrate it on the ground that it presented a representation matter for the National Labor Relations Board (R. 14, 16, 30).

On June 8, 1960, IUE petitioned the New York Supreme Court, in and for the County of New York, for an order compelling arbitration of this and other grievances, not here relevant (R. 7-16). The New York Supreme Court, though it granted the IUE petition with respect to other grievances, declined to order arbitration as to the instant grievance (R. 42-50). The Appellate Division, with one Justice dissenting, affirmed the lower court (R. 54-62). The Court of Appeals of the State of New York, in a *per curiam* opinion (R. 65-67), affirmed the Appellate Division, holding that the grievance involved the definition of bargaining units and that it was "within the exclusive jurisdiction of NLRB, which has the expertise to make clear the precise nature of the bargaining units certified by it." Judge Fuld dissented, holding that the preemption doctrine (see n. 4, *infra*) was inapplicable to suits, such as the instant one, for breach of a collective bargaining agreement. He added that: "The circumstance that there might be a claim before the National Board *at some date in the future* should not operate to deprive the parties of contract rights at the present time." (R. 68-69, emphasis in original.)

SUMMARY OF ARGUMENT

In *Smith* v. *Evening News Association*, 371 U.S. 195, this Court held that the courts have jurisdiction under Section 301 of the Labor Management Relations Act to entertain suits for breach of a collective bargaining agreement even when the conduct alleged to constitute the breach might also constitute an unfair labor prac-

tice cognizable by the NLRB under Sections 8 and 10 of the NLRA.

The basic question presented here is whether inter-union jurisdictional disputes form an exception to the general rule either because special provisions of the NLRA may be implicated or because one of the unions is not a party to the collective bargaining agreement. Two basic types of inter-union "jurisdictional disputes" should be distinguished: (i) a "work assignment dispute" involving a controversy as to whether certain work should be performed by workers in one or another of two bargaining units; and (ii) a "representational dispute," in which the issue is not where the work should go, but rather which union should represent the employees doing that work. We believe the present case grows out of a representation, rather than a work assignment dispute, but since this is not at all certain we consider the jurisdictional issue on each assumption.

A. Under Section 8(b)(4)(D) it is an unfair labor practice for a labor organization to strike or threaten to strike for the purpose of forcing an employer to assign particular work to its members rather than to the members of another union. And when a violation of that section is charged, the Board is then empowered by Section 10(k) to hear and determine the jurisdictional dispute out of which the strike arose. Where the union has actually gone on strike in support of its work assignment demands, there is no greater reason to hold that the NLRB remedy is exclusive than there is where the union is seeking arbitration or an adjudication of a breach of contract involving a discriminatory discharge or other employer unfair labor practice. All of the reasons which underlie the *Smith* decision

are applicable here. And in a case where the work assignment dispute has not yet erupted into a strike, there are additional reasons for allowing judicial enforcement of any contract rights. Section 8(b)(4)(D) gives no remedy whatever to the aggrieved union, and neither it nor Section 10(k) even comes into play unless there is a strike. To foreclose the use of the courts or the arbitral forum would run counter to NLRA policies by forcing the union to resort to an unfair labor practice in order to redress what it believed to be an employer's breach of contract. Moreover, Section 10(k) reveals on its face a strong policy of encouraging the use of private arbitration to settle jurisdictional disputes.

Although the inability to bind both unions lessens, it by no means destroys, the value of grievance arbitration as a remedy for work assignment disputes. Either the State court or the arbitrator, once its jurisdiction is established, might allow the Federation to intervene. But even if not, the proceeding would not be fruitless. If the IUE loses, that will probably be the end of the matter; if it prevails, the arbitrator's opinion may persuade the Federation that its claim lacks merit or may persuade another arbitrator not to award the same work to the Federation. Arbitration of work assignments is common practice, and while the awards do not always terminate the controversy, on the whole they have been conducive to final settlements.

B. In our view, however, the grievance here involves a question of representation, rather than work assignment. Such controversies may come before the Board either on a refusal-to-bargain charge brought by the aggrieved union against the employer under Section 8(a)(5), or on a motion to clarify the certification filed

by either of the rival unions or by the employer under Section 9. The availability of a Section 8(a)(5) remedy, as *Smith* squarely decided, would not oust a court of jurisdiction, and there is no reason to give greater significance to the availability of a motion to clarify, since the policies underlying *Smith* are equally applicable there. While there are several practical and legal differences between a three-sided dispute over the scope of a bargaining unit and the ordinary unfair labor practice dispute, these differences are insufficient to require a difference in jurisdiction. In the first place, the introduction of exceptions based upon the particular clause of the contract said to be violated or the precise provisions of the NLRA that might be invoked would introduce technical niceties productive of delay and confusion. It would be particularly impracticable to make the jurisdictional issue turn upon the often formal and narrow distinctions between a work assignment and a representation dispute. Second, many claims under collective bargaining agreements relating to the scope of the unit covered will depend upon the language of the contract rather than any NLRB ruling, and any contractual departures from the NLRB units will result from the type of voluntary arrangements with which the preemption doctrine is not concerned. Third, ousting arbitrators of jurisdiction in any case involving a representation question would frequently fragment questions that ought to be considered whole, *e.g.*, the seniority status under the collective bargaining agreement of the current holders of the disputed jobs. Fourth, the danger of hampering the growth of umpireships and voluntary arbitration is not substantially less than in the situations envisaged in *Smith*.

ARGUMENT

INTRODUCTORY

The national labor policy is to encourage and support the private arbitration of disputes arising under collective bargaining agreements. An arbitration clause will generally be enforced even though the dispute, or some part of it, might arise out of an unfair labor practice within NLRB jurisdiction. In *Smith* v. *Evening News Association*, 371 U.S. 195, this Court held that the courts have jurisdiction under Section 301 of the Labor Management Relations Act to entertain suits for breach of a collective bargaining agreement even when the conduct alleged to constitute the breach might constitute an unfair labor practice cognizable by the NLRB under Sections 8 and 10 of the NLRA. Although the Act precludes the application of State statutes and common law doctrines regulating the conduct of employers, employees, and their representatives apart from a collective agreement,[4] that principle does not apply to the enforcement of obligations voluntarily incurred in the bargaining that the Act is intended to promote. See also *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101, n. 9; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245, n. 5; *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 513. The *Smith* decision obviously applies to actions to enforce agreements to arbitrate, and also, *a fortiori*, to proceedings before an arbitrator.

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[4] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch Inc.*, 348 U.S. 468; *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

At bottom, the *Smith* ruling rests upon four grounds:

(1) Congress, in enacting Section 301 of the LMRA and in declining to make breach of a collective bargaining agreement an unfair labor practice manifested an intent to permit judicial remedies for violation of a collective bargaining agreement to operate concurrently with, and in addition to, any remedies which might exist under the NLRA for the same conduct.

(2) State statutory and tort law (as to which the *Garmon* preemption doctrine is applicable) are rules devised by government and imposed coercively upon the parties from without, whereas the standards of conduct prescribed by a collective bargaining agreement are self-imposed and shaped to the particular circumstances of the enterprise whose industrial life they govern. Accordingly, the enforcement of contract provisions by tribunals other than the Board does not entail the same danger of upsetting the federal statutory balance between the interests of labor and management that is present when another governmental body attempts to impose restraints not based upon mutual consent. Indeed, where the parties have bargained for lawful contractual provisions and agreed upon a procedure for enforcing them, it promotes industrial peace and the private resolution of disputes to give effect to their arrangements. Requiring the parties to utilize only an NLRB remedy would, on the other hand, defeat their contractual expectations, deprive them of whatever bargained-for benefits the particular contract clause was intended to confer, and thus impair the flexibility and autonomy of the institution of collective bargaining.

(3) The unfair labor practice element of many contract questions is often only a small aspect of the total problem, and it is impractical to segment the problem and have part of it adjudicated by the Board and the remainder by the court or arbitrator. Frequently, moreover, the unfair labor practice question may turn upon difficult subsidiary questions of contract construction, which an arbitrator or a court could decide as well as, if not better than, the Board.

(4) To deny the court power to enforce contract provisions which could also give rise to unfair labor practice questions would tend to cripple the operation of private grievance procedures. If the courts were unable to compel recalcitrant parties to submit to arbitration and to abide by the arbitrator's decision, compliance with arbitration agreements would become merely optional. Furthermore, to hold that the preemption doctrine governs all contract provisions that deal with a dispute touched by the NLRA would require arbitrators to defer to the Board, a result which would undermine the congressional policy of giving full play to the methods of grievance settlement that the parties themselves have chosen—a policy which the Board itself has recognized in its administration of the NLRA.[5]

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[5] Although Section 10(a) of the Act provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," the Board, from its earliest days, has generally declined to exercise jurisdiction with respect to unfair labor practice questions which had been, or could have been, submitted to arbitration under the collective bargaining contract. In *Consolidated Aircraft Corp.*, 47 NLRB 694, it was alleged that the employer had made unilateral changes in wages in violation of Section 8(a)(5) and had discharged two employees

The basic question presented in the instant case is whether interunion jurisdictional disputes form an exception to the general rule either because special provisions of the NLRA may be implicated or because one of the unions is not a party to the collective bargaining agreement and arbitration clause that the other union is seeking to enforce. We believe, as we show below (pp. 16-17 and 25-31), that each of the foregoing reasons for the *Smith* decision is equally applicable even when the proceeding involves an interunion dispute. However, the issue is more complex because the underlying controversy involves not simply the employer and a single collective bargaining agreement but two contracts and two rival labor organizations each representing a different group of employees. Furthermore, the parties might invoke not one but several potential heads of NLRB jurisdiction.

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in violation of Section 8(a)(3). Finding that the propriety of the wage changes turned on an interpretation of the collective agreement, which could have been, but was not, submitted to arbitration under the contract, and that the question of the discharges could likewise have been processed under that procedure, the Board dismissed the unfair labor practice charges. See also *Spielberg Mfg. Co.*, 112 NLRB 1080; *Crown Zellerbach Corp.*, 95 NLRB 753; *McDonnell Aircraft Corp.*, 109 NLRB 930; *United Telephone Company of the West*, 112 NLRB 779; *Hercules Motor Corp.*, 136 NLRB 1648; *Dubo Manufacturing Corp.*, 142 NLRB No. 47, 53 LRRM 1070. Furthermore, the Board has recently held that the same considerations which moved it to honor arbitration awards in unfair labor practice cases warrant a similar acceptance of the arbitral process in representation proceedings. *Raley's, Inc.*, 143 NLRB No. 40, 53 LRRM 1347.

An exception is usually made only where the arbitration proceedings were not fair, the arbitrator did not consider the issue before the Board, or the result reached was repugnant to the purposes and policies of the Act. See *Raytheon Co.*, 140 NLRB No. 84, 52 LRRM 1129; *Wertheimer Stores Corp.*, 107 NLRB 1434; *Monsanto Chemical Corp.*, 97 NLRB 517.

In discussing this issue, it will be helpful first to describe the interunion "jurisdictional disputes" which may arise during the term of a collective bargaining agreement and for the prosecution of which either union may find the terms of the agreement a potential weapon. Such controversies take various forms, but two have the greatest qualitative and quantitative importance. One is called the "work assignment dispute" because the conflict is between two groups of workers each represented by a different union and each claiming the exclusive right to perform certain tasks. The clearest examples arise in the construction industry where carpenters and laborers, for example, long disputed the right to do the work of erecting scaffolding for a building.[6] Whoever won, each group of men would continue to have the same union as its representative. No one would change his union affiliation. There would be an increase in the total amount of work available to be done by one group and a decrease for the other. Similar controversies arise in industrial plants; for example, the production workers and maintenance mechanics might both claim the right to make routine repairs to production machinery.[7]

At the other pole lies the "representational dispute." Its simplest form is rivalry between two unions such as the United Automobile Workers and the International Association of Machinists to become the desig-

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[6] See Decision of the National Board for Jurisdictional Awards in the Building Industry, reported in *Plan for Settling Jurisdictional Disputes Nationally and Locally, Agreements and Decisions Rendered Affecting the Building Industry, Building and Construction Trades Department, A.F. of L.*, 73-74 (1950).

[7] See *International Minerals & Chemical Corp.*, 37 LA 528.

nated representative of a given group of employees. Under the National Labor Relations Act such disputes are resolved by an election. More important for present purposes are the controversies over fringe groups which might be included in either of two bargaining units represented by two different unions. One example is a dispute over whether machine fixers in a cigarette factory who make regular and routine adjustments on production machines are to be included in the production unit and represented by the Tobacco Workers or in a craft unit of skilled maintenance machinists represented by the International Association of Machinists.[8] Another example is a controversy over whether employees engaged in maintenance of powerhouse equipment outside a powerhouse are to be included in a unit of powerhouse employees or in the plant maintenance unit.[9] Under the National Labor Relations Act such disputes may be resolved by the Board's definition of the appropriate bargaining unit.[10]

The distinction which is so clear at the poles is often blurred in the middle. It may depend, as we show in the Argument (pp. 26-28), wholly upon the way in which the issue is formulated by the moving party for its own tactical advantage; thus, in the first example above the IAM might, under some circumstances, contend that the task of fixing machines must be assigned to skilled machinists rather than to the men currently performing the work. The very fact that the line is

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[8] See *Philip Morris & Co., Ltd.*, 70 NLRB 274.

[9] See *St. Regis Paper Co.*, 130 NLRB 1235.

[10] The problem of defining the scope of the bargaining unit may also arise when it is contended that a new store or facility is an "accretion" to an existing unit. See *Essex Wire Corp.*, 130 NLRB 450; *Retail Clerks Union, Local 770* v. *Thriftimart, Inc.*, 30 Cal. Rptr. 12, 380 P. 2d 652.

blurred and the issue can often be framed either way has important consequences in determining whether the NLRB's jurisdiction is exclusive. See pp. 25-28 below.

It is far from clear whether the present case grows out of a controversy over work assignments or a dispute over questions of representation requiring more precise definition of the bargaining unit. We believe the latter classification to be correct, but in view of the uncertainty and because of the need for treating both types of controversy in the same fashion in determining whether courts and arbitrators have jurisdiction, we shall consider first the status of work assignment controversies and then turn to questions of representation. In each instance, of course, we speak only of cases involving the interpretation and enforcement of a collective bargaining agreement.

I

The Jurisdiction of the NLRB in the Event of a Strike Over Disputes Involving Work Assignments Does Not Preclude Arbitration of Such a Dispute Under the Terms of a Collective Bargaining Agreement

Work assignment disputes may come before the NLRB under Sections 8(b)(4) and 10(k). Under Section 8(b)(4)(D) it is an unfair labor practice for a labor organization to strike or otherwise induce a cessation of work, or to threaten such action, where an object thereof is—

> forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class
> * * *

That Section, in turn, triggers Section 10(k), which provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. * * *

In rare cases employers have taken to arbitration,[11] and more often to court,[12] claims that a union's resort to a strike violates a collective bargaining agreement; and such a case may potentially involve conduct that violates Section 8(b)(4)(D). There is no greater reason to hold that the NLRB remedy is exclusive in such situations than there is where the union is seeking arbitration or adjudication of an alleged breach of contract that may also have involved a discriminatory discharge or other employer unfair labor practice.

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[11] *Bee Line, Inc.*, 20 LA 675; *In Re Regent Quality Furniture, Inc.*, 20 LA 609; *In re Ruppert*, 29 LA 775; *In Re Advance Trucking Corp.*, 52 LRRM 2365.

[12] *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238; *Drake Bakeries* v. *Local 50, American Bakery & Confectionary Workers*, 370 U.S. 254; *International Union of Operating Engineers* v. *Bay City Erection Co.*, 300 F. 2d 270 (C.A. 5); *International Brotherhood of Teamsters* v. *W.L. Mead, Inc.*, 230 F. 2d 576 (C.A. 1); *United Electrical, Radio & Machine Workers* v. *Oliver Corp.*, 205 F. 2d 376 (C.A. 8); *International Union of Operating Engineers* v. *Dahlem Construction Co.*, 193 F. 2d 470 (C.A. 6).

Each of the four reasons for the *Smith* decision is applicable here.

(1) The legislative history shows a general intent to make judicial remedies available for breach of contract and the emphasis was on suits against unions.

(2) There is no danger that the balance of legal rights and duties struck by Congress will be upset by statutory or judge-made law imposed upon the parties. Any additional obligations will be imposed by contract, and the policy of the NLRA is to encourage the mutual assumption of such obligations.

(3) Again, as in the case of discharges, the claim to be arbitrated or litigated may be broader than any possible charge of unfair labor practices, so that giving the Board exclusive jurisdiction of the latter aspect would require fragmenting a single case.

(4) Finally, controversies over work assignments, like disputes over alleged improper discharges, are part of the familiar grist of grievance arbitration. For example, in *Reynolds Metals Co.*, 39 LA 730, the arbitrator was called upon to decide whether the employer had violated a contract covering a unit of truck drivers by assigning the work of driving "fork lifts" in plant maintenance work to members of the production and maintenance unit. In *Kaiser Aluminum & Chemical Corp.*, 38 LA 538, the question was whether the employer had violated the job classification provisions of the contract by assigning the work of removing, cleaning, reinstalling, and aligning bearings on a turbo-generator to employees classified as General Repair-

men, rather than to Electricians. Other examples are collected in the footnote.[13]

In the case of disputes over work assignments prior to a strike, there are additional reasons for allowing judicial enforcement of any contract rights. Section 8(b)(4)(D) is only potentially involved, depending upon future events. It gives no remedy to the union which believes that its contract has been violated. Jurisdiction under Section 10(k) is triggered only by a strike, or a threat thereof, for it provides that the Board shall have power to determine the dispute—

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), * * *.

Thus, to foreclose the use of the courts or the arbitral forum in every work assignment dispute would run

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[13] *E.g.*, *Goodyear Tire & Rubber Co.*, 35 LA 917 (did employer violate contract provision banning performance by supervisors of "work normally performed by employees in the bargaining unit" when, after installing automatic equipment to operate a certain machine, it assigned to supervisor rather than machine operator the job of pushing buttons and monitoring machine's performance?); *Bell Helicopter Corp.*, 34 LA 412 (did employer violate contract clause recognizing union as representative of all production and maintenance employees when it allowed laboratory employees, who were excluded from unit, to build wooden form for new part, rather than assigning job to bargaining-unit patternmaker?); *Kelsey-Hayes Co.*, 32 LA 235 (did employer violate job classification provisions of contract when it assigned machinists rather than millwrights to repair certain machinery?); *Alco Products, Inc.*, 32 LA 873 (did employer violate contract's seniority provisions by assigning to mechanic work of operating machine tool when machinist was in layoff status?). See also, *Illinois Bell Telephone Co.*, 39 LA 467; *Ed Friedrich, Inc.*, 39 LA 399; *Higgins, Inc.*, 37 LA 297; *General Motors Corp.*, 37 LA 192; *Beaunit Mills, Inc.*, 37 LA 366.

counter to NLRA policies by forcing the aggrieved union to resort to an unfair labor practice in order to redress what it believed to be the employer's breach of contract. Moreover, Section 10(k) reveals upon its face a strong policy of encouraging the use of private arbitration instead of drawing all such controversies into the Board. The legislative history also indicates that one purpose of Section 10(k) was to encourage the creation and utilization of private methods of dispute settlement.[14] Accordingly, the Board has repeatedly given effect to private agreements for the settlement of jurisdictional disputes.[15]

We concede that the arbitration machinery invoked by the IUE in the present case is not an agreed upon method of settling the interunion dispute, within the meaning of Section 10(k), because the contract does not bind the Federation of Westinghouse Salaried Employees. If either union went on strike and the employer charged a violation of Section 8(b)(4)(D), the Board would have a duty to determine the dispute.[16]

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[14] See 93 Cong. Rec. 4035, 2 Leg. Hist. LMRA 1046 (CPP.O. 1948); *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 577; *Acoustical Contractors Association of Cleveland*, 119 NLRB 1345, 1352; *A.W. Lee, Inc.*, 113 NLRB 947, 951.

[15] *Manhattan Construction Co.*, 96 NLRB 1045; *Wm. F. Traylor*, 97 NLRB 1003; *A.W. Lee, Inc.*, 113 NLRB 947; *Acoustical Contractors Association of Cleveland*, 119 NLRB 1345; *Don Cartage Co., Inc.*, 121 NLRB 101; *Armco Drainage & Metal Products Co.*, 137 NLRB 1753.

[16] See *New York Mailers' Union No. 6 (The New York Times Co.)*, 137 NLRB 665, 668-669; *Local Union 825, Operating Engineers (Nichols Electric Co.)*, 137 NLRB 1425, 1429. Cf. *Local Union No. 68, Wood, Wire and Metal Lathers Union (Acoustics & Specialties, Inc.)*, 142 NLRB No. 101, 53 LRRM 1181.

But it would charge Congress with an extraordinary incongruity to suppose that, although it desired to promote both arbitration under collective agreements and the voluntary settlement of jurisdictional disputes, it nevertheless desired to exclude the arbitration of work assignments between the two parties to a collective bargaining agreement in favor of the jurisdiction that the Board would have if, and only if, a strike should result.

Although the inability to bind both unions lessens the value of grievance arbitration as a remedy for disputes over work assignments, it would be a serious mistake to brush the procedure aside as unimportant. We deal here only with the question of jurisdiction to order arbitration. The State court, once its jurisdiction is established, may allow the Federation to intervene.[17] The court might require the arbitrator to allow intervention or the arbitrator might take that step upon his own motion.[18] Even if none of these measures were adopted—and perhaps the law of arbitration provides for none[19]—the proceeding would not be fruitless. If

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[17] See Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 576 (1963); but compare *Local Lodge 1836, IAM* v. *Local No. 1505, IBEW and Raytheon Co.*, 201 F. Supp. 334, 337 (D. Mass.), reversed on other grounds, 304 F. 2d 365, 367 (C.A. 1), vacated as moot, 372 U.S. 523.

[18] Indeed, one arbitrator, called upon to resolve a dispute between the Machinists and the employer over an allegedly improper assignment of work to employees represented by the Ironworkers, issued an "arbitral interpleader," joining Ironworkers as a party to the arbitration proceeding. *National Steel & Shipbuilding Co.*, 40 LA 625, 630-636.

[19] See *Ball Brothers Co., Inc.*, 27 LA 353; *Dumas* v. *Upland Bros., Inc.*, 16 LA 588 (N.Y. Sup. Ct., N.Y. County); cf. *Soto* v. *Goldman*, 34 LA 173 (N.Y. Ct. Appls); *Darrell* v. *Neushaefer*, 22 LA 240 (N.Y. Sup. Ct., N.Y. County).

For a general discussion of the analogous problem of the right of

the IUE loses, that will probably be the end of the matter.[20] If IUE prevails, the employer may be able to use the arbitrator's opinion to persuade the Federation that its claim lacks merit, or another arbitrator hearing the ensuing dispute between the employer and the Federation may decide that the two collective bargaining agreements are consistent and render an award compatible with the first decision.

Our conviction that the arbitration of work assignments under collective agreements will aid in resolving inter-union jurisdictional disputes without either side resorting to the unfair labor practice that alone would give the Board jurisdiction is based upon experience as well as logical analysis. Arbitration of work assignments is common practice; and while the reports do not show how often there was a rival union in the background, more often than not the cases involve decisions concerning the scope of a collective agreement. See, *e.g., Reynolds Metals Co.*, 39 LA 730; *American-International Aluminum Corp.*, 38 LA 1131; *Theo. Hamm Brewing Co.*, 34 LA 698; *Wyandotte Chemicals Corp.*, 38 LA 808. In the railroad industry two unions are always involved, but the practice is nonetheless for the Adjustment Boards to render decisions under each

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the individual employee to intervene in arbitration proceedings instituted by the union or the employer, and affecting his interests, see Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362, 405-410 (1962). See also Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 616-619, 645-652 (1956).

[20] Since the IUE had a contract procedure available and had utilized it, it would appear that it could not use the Board as a forum to relitigate its claim to the work in question. See *Acoustical Contractors Association of Cleveland*, 119 NLRB 1345, 1353; *A.W. Lee, Inc.*, 113 NLRB 947, 953-954, n. 14, p. 18, *supra*.

separate union agreement. See *Missouri-Kansas-Texas Ry. Co.* v. *Brotherhood of Railway & S. S. Clerks*, 188 F. 2d 302, 305 (C.A. 7); *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Ry. Co.*, 229 F. 2d 59, 62-64 (C.A. 8), certiorari denied, 350 U.S. 997. The awards do not always terminate the controversy, but on the whole they have been conducive to final settlements.[21]

For the foregoing reasons we think it plain that the

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[21] In *Whitehouse* v. *Illinois Central Ry. Co.*, 349 U.S. 366, the clear possibility that arbitration between one union and the employer could result in final settlement of an inter-union work assignment dispute led this Court to reverse an injunction which had issued enjoining the National Railroad Adjustment Board from deciding the dispute. The plaintiff employer had urged, just as respondent does here, that an award rendered in a proceeding with only one union participating would not prevent the other union from successfully prosecuting a similar claim under its contract, and that if the arbitration proceedings were not enjoined the employer might be confronted with conflicting claims and suffer irreparable injury. The Court held, however, that the injuries feared by the employer were too speculative to warrant judicial relief, stating that, "Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it" (*Id.*, at 373). So here, an arbitration award may be rendered "which could occasion no possible injury" to respondent. It might obtain an award in its favor in the arbitration with IUE, or, should that award be in favor of IUE, the same result might be reached in any arbitration, if there be such, with Federation.

See, however, *Order of Railway Telegraphers* v. *New Orleans, Texas & Mexico Ry. Co.*, 229 F. 2d 59 (C.A. 8), certiorari denied, 350 U.S. 997; *Allain* v. *Tummon*, 212 F. 2d 32 (C.A. 7); *Missouri-Kansas-Texas Ry. Co.* v. *Brotherhood of Railway & S.S. Clerks*, 188 F. 2d 302 (C.A. 7); *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8), certiorari denied, 340 U.S. 823; *Hunter* v. *Atchison, Topeka & S.F. Ry. Co.*, 171 F. 2d 594 (C.A. 7), certiorari denied, 337 U.S. 916; cf. *Estes* v. *Union Terminal Co.*, 89 F. 2d 768 (C.A. 5); *Nord* v. *Griffin*, 86 F. 2d 481 (C.A. 7), certiorari denied, 300 U.S. 673. See also *Retail Clerks Union, Local 770* v. *Thriftimart, Inc.*, 30 Cal. Rptr. 12, 380 P. 2d 652, 655-656.

conditional and limited jurisdiction of the Board over work assignment disputes does not preclude their arbitration under collective bargaining agreements. This proposition would dispose of the present case if the present controversy were to be classified as a work assignment dispute that might give rise to a controversy potentially cognizable under Sections 8(b)(4)(D) and 10(k) but not under any other section of the Act.

In our view, however, the grievance involves questions of representation cognizable, as we shall show (p. 24 below), under Sections 8(a)(5) and 9. The original grievance complained that (R. 41)—

> The employees working on induction heating and are performing assembly and wiring; power brake operations; machining operations; and attending to the tool crib and storeroom operations should be in the IUE, Local 130 bargaining unit.

The grievance makes a claim as to how the employees who are doing the work should be classified, not as to who should be doing the work. The petition in support of the motion to compel arbitration complains of the failure to apply the IUE agreement to the employees doing the work. It stakes the union's case upon the recognition clause by which Westinghouse promised to recognize IUE as the representative of, and apply the contract to, all employees in those units for which IUE had been certified by the NLRB. The contract referred specifically to a certification of IUE as the representative of "All production and maintenance employees of the Employer at its Baltimore Works . . . excluding all salaried and technical employees . . . professional employees . . ." IUE's claim

was that the employees in question were ordinary production and maintenance workers. The Company's view, in which the Federation presumably joined, was that the employees in question were not production workers but "salaried and technical employees" or "professional employees" within the meaning of the exception, and so they were within the unit for which Federation was the certified representative. Since the dispute was over the placement of employees and not merely work in one of two units, and the contractual definition of the unit was in the terms of the NLRB certification, it seems to us that the controversy was a representational dispute over which the Board might have jurisdiction not only under Sections 8(b)(4)(D) and 10(k),[22] but also under Sections 8(a)(5) and 9.

It is therefore necessary next to consider whether the NLRB jurisdiction over questions of representation under the latter sections requires an exception to the normal rule that the jurisdiction of the NLRB does not preclude arbitration under, or judicial enforcement of, the terms of a collective bargaining agreement.

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[22] Sections 8(b)(4)(D) and 10(k) include more than the pure form of jurisdictional dispute defined above, i.e., a dispute between two unions as to who shall perform certain work. They include disputes between a union and an unorganized group of employees (*New London Mills, Inc.*, 91 NLRB 1003). See also *Juneau Spruce Corp.*, 82 NLRB 650, 660 (Member Murdock dissenting). Moreover, occasionally the line between representation and work assignment so overlaps that the Board will decide the former type question in a Section 10(k) proceeding, and *vice versa*. Cf. *Cleveland Pneumatic Tool Co.*, 142 NLRB No. 48, 53 LRRM 1025, with *Gas Service Company*, 140 NLRB No. 45, 52 LRRM 1037. See also *Newark & Essex Plastering Co.*, 121 NLRB 1094, 1109, n. 37.

II

The Jurisdiction of the NLRB Over Questions of Representation Does Not Preclude Arbitration Over the Scope of a Collective Bargaining Agreement Pursuant to Its Terms

A question of representation involving definition of the scope of the bargaining unit—the controversy in the present case for example—may come before the Board in several ways. The aggrieved union might charge the employer with violating Section 8(a) (5) and if its position were sound obtain both an adjudication of a past unfair practice and an order to bargain collectively. *E. I. DuPont De Nemours,* 99 NLRB 390; *Clarostat Mfg. Co.,* 107 NLRB 775; *Perry Coal Co.,* 125 NLRB 1256; *Yutana Barge Lines,* 123 NLRB 1073; *Essex Wire Corp.,* 130 NLRB 450; cf. *Illinois Malleable Iron Co.,* 120 NLRB 451; *Marietta Paint and Color Co.,* 136 NLRB 1530. Either of the rival unions or the employer might, upon motion, obtain a clarification of the certifications, thus laying the foundation for refusal to bargain proceedings. *The Lumber and Millwork Industry Labor Committee,* 136 NLRB 1083; *Blaw-Knox Co.,* 135 NLRB 862; *Western Cartridge Co.,* 134 NLRB 67; *Kennametal, Inc.,* 132 NLRB 194; *St. Regis Paper Co.,* 130 NLRB 1235; *Alpha Corp.,* 128 NLRB 309; *Kennecott Copper Corp.,* 122 NLRB 198; *Levingston Shipbuilding Corp.,* 120 NLRB 205; *Woodward Iron Co.,* 116 NLRB 1639; *Radio Station KHQ,* 111 NLRB 874; *Clarostat Mfg. Co.,* 105 NLRB 20; *Hughes Tool Co.,* 85 NLRB 663.

As a general rule the existence of NLRB remedies does not preclude seeking a judicial or arbitral remedy for the same or an overlapping controversy under the terms of a collective bargaining agreement. The point was squarely decided, we have seen, in *Smith* v. *Even-*

ing News Association. The bare fact that IUE might have sought similar relief under Section 8(a)(5) would not oust the court of jurisdiction to enforce the agreement to arbitrate. There is no reason to give greater significance to availability of a motion to clarify the certification.

Respondent correctly points to several practical and legal differences between a three-sided dispute over the scope of bargaining units and a simple discharge alleged to be in violation of a contract either because of anti-union discrimination or for some other reason such as the lack of just cause. We set forth below our reasons for thinking that the differences, though substantial, are not sufficient to require a difference in jurisdiction. It seems appropriate to point out first, however, that the policies underlying the *Smith* case are also applicable to the present issue.

(1) Although the familiarity of the NLRB as a forum for the resolution of questions of representation undoubtedly reduced the need for judicial remedies and the objections to NLRB proceedings that led Congress to emphasize judicial remedies for breach of collective bargaining agreements, the introduction of exceptions based upon the particular clause of the contract said to be violated or the precise provision of the NLRA that might be invoked would introduce technical niceties productive only of delay and confusion.

The force of this proposition is clearly illustrated by the problems mooted in the present case. The partial jurisdiction of the NLRB over work assignment disputes is not sufficient to oust courts and arbitrators of jurisdiction where a breach of contract is alleged. See pp. 14-23 above. Despite the differences in principle, work assignment disputes and questions of repre-

sentation involving the scope of a bargaining unit are often so formal and narrow as to make it inadvisable to create an artificial need for differentiation by making the distinction decisive of the court's or arbitrator's jurisdiction.[23] The present case, in our view, involves

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[23] The distinction between a work assignment dispute and a dispute involving the scope of a bargaining unit is significant in other contexts. For example, when a certified union seeks to represent additional employees, alleging that they should be in the unit for which it was certified, the Board treats the question as one involving representation rights and will entertain a motion to clarify the union's certification to resolve its claim. See cases cited p. 24, *supra*. When, on the other hand, a union merely seeks additional work for employees already within its unit, the Board will not entertain such a motion. *General Aniline & Film Corp.*, 89 NLRB 467; *American Broadcasting Co.*, 112 NLRB 605; *Radio Station KHQ*, 111 NLRB 874; *Anheuser-Busch, Inc.*, 116 NLRB 1988; *Employing Plasterers Association of the District of Columbia*, 118 NLRB 17; *Gas Service Co.*, 140 NLRB No. 45, 52 LRRM 1037. Cf. *Communications Workers of America*, 118 NLRB 1104. The rationale underlying the Board's refusal to resolve a work assignment dispute by means of a motion to clarify a certification was stated by it in *Plumbing Contractors Ass'n of Baltimore, Md.*, 93 NLRB 1081, 1087:

> [A] Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining. It is true that such certification presupposes a determination that the group of employees involved constitute an appropriate unit for collective bargaining purposes, and that in making such determination the Board considers the general nature of the duties and work tasks of such employees. However, unlike a jurisdictional award, this determination by the Board does not freeze the duties or work tasks of the employees in the unit found appropriate. Thus, the Board's unit finding does not *per se* preclude the employer from adding to, or subtracting from, the employees' work assignments. While that finding may be determined by, it does not determine, job content; nor does it signify approval, in any respect, of any work task claims which the certified union may have made before this Board or elsewhere. [Footnote omitted.]

the definition of the bargaining unit without changing the identity of the employees doing the work, but IUE might well have complained that the assignment of the work in question to technical or professional employees instead of production workers violated the collective bargaining agreement; in the latter event each group of employees would continue to have the same representative but the identity of the men doing the particular jobs would be changed. Indeed, IUE's demand may well achieve such an objective. For, if the employees whom it claimed were covered by its agreement were actually subjected to the contract, they would come under the seniority clause and might well rank lower on the roster than other employees in the unit who had been laid off.[24]

International Association of Machinists v. *Raytheon Mfg. Co.*, 304 F. 2d 365 (C.A. 1), certiorari granted, 371 U.S. 908, judgment vacated as moot, 372 U.S. 523, is another good example, for the dispute was unusually hard to classify. There, although the dispute was on the surface a work assignment question (the Machinists claiming that certain work being performed by electricians represented by the IBEW was in reality work which should be performed by production workers represented by the Machinists), it was in reality part of the long range struggle between craft and industrial unions to secure greater representation rights with

[24] Moreover, it should be noted that IUE states in its petition (Pet. for Cert. 9): "Whatever overtones the Baltimore grievance may carry with respect to the Union's certification, the grievance sought to be arbitrated is a work assignment grievance. The essential question to be answered in arbitration is whether the Company was obligated by its agreement to assign the work in question to employees covered by its agreement with the Union and to apply the terms of the agreement to the performance of this work."

respect to the employees in industrial plants. In *Carey* v. *General Electric Co.*, 315 F. 2d 499, 509 (C.A. 2), petition for certiorari pending, No. 114, this Term, there are three grievances which appear to present the same basic problem; yet one is couched in representation terms, another in work assignment terms, and the third in more general terms.[25]

(2) Although the grievance in the present case apparently turns upon the interpretation of a paragraph quoted from an NLRB certification, many claims under collective bargaining agreements relating to the scope of the unit covered will depend upon the language of the contract rather than any NLRB ruling. Many contracts are negotiated without an NLRB certification, and the question would be what unit did the parties agree to cover by the contract, not what would the NLRB determine was the unit appropriate for an election. An employer and union may expand a unit by adding groups not within the certification, and there are decisions indicating that a union may bind itself not to seek to organize employees who might otherwise be included within a contract unit.[26] The departures

[25] National Docket No. 4114 alleged that the Company violated its agreement with the union in assigning assembly work on military guidance systems to "laboratory technicians," persons outside the bargaining unit, and in declining to recognize the union as their bargaining representative. National Docket Nos. 4606-11 involved the assignment of work normally performed by employees within the bargaining unit to employees in a different unit represented by a different unit. National Docket No. 4922 protested the removal of certain crystal processors from the production and maintenance unit and the conversion of their jobs from hourly pay to salary, without any change in their duties. 315 F. 2d at 508.

[26] *Briggs Indiana Corp.*, 63 NLRB 1270; *Essex County News Co.*, 76 NLRB 1340; *Huron Portland Cement Co.*, 115 NLRB 879.

from NLRB units, when they occur, will, of necessity, be more limited than the obligations imposed by clauses dealing with substantive terms and conditions of employment, but they will be the result of private contract rather than the interposition of involuntary statutory or common law obligations upsetting the balance that Congress struck. The preemption doctrine is not directed at such voluntary, contractual arrangements.

(3) As in the case of the discharges and similar grievances considered in *Smith* v. *Evening News*, ousting an arbitrator of jurisdiction in any case involving a question of representation would frequently fragment questions that ought to be considered whole. Cases like the present often result from the pressure of layoffs for lack of work. The real issue is not which union shall do the bargaining, but which seniority roster shall govern particular jobs. If the grieving union succeeds in obtaining from the Board a clarification of its certificate, it will have won the right to represent those doing the work in question; but that will often be only half the battle. What the union may really be seeking is a right to oust those currently doing the work so that its own laid-off workers can take their places. Whether it has that right—*i.e.*, whether the holders of the disputed jobs, as newcomers to the bargaining unit, become junior to the other employees in the unit—will depend on the seniority clause in the union's contract and may invoke further controversy. See Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 574 (1963). The Board can make only the preliminary determination of the scope of the unit. The actual application of the seniority clause to the individuals concerned, any

questions concerning its interpretation, and any other questions such as the ability of one man or another to do the work would have to go back to arbitration. It is simpler and more expeditious to submit all the questions to arbitration.[27]

(4) The danger of hampering the sound growth of umpireships and voluntary arbitration as a method of resolving disputes under collective bargaining agreements is not substantially less than in the situations envisaged in *Smith* v. *Evening News Association*, 371 U.S. 195. Disputes over the scope of the bargaining unit, the reach of the seniority clause, or the right to perform certain kinds of work are, as we have shown, part of the daily grist of arbitration. The court of appeals concluded that disputes over the scope of the union should not be referred to arbitration because their resolution requires the special expertise of the Board. We think this view denigrates the skill and experience of most arbitrators. The controversies require the application of rather general categories to particular jobs. Detailed knowledge of the character of a few men's jobs and their relation to the company's total activities will usually be more important than basic principles affecting the appropriateness of several possible units. Arbitrators frequently acquire this kind of technical knowledge through experience in other kinds of cases such as job evaluations, work assignments and controversies over qualifications for particular work. They, unlike the Board, can visit the plant and observe the work in question. Grievance

[27] Similarly, in a situation like that in *General Electric*, p. 28, *supra*, it is simpler and more expeditious to let the arbitrator decide all of the grievances, rather than to try to separate out the representation questions from the work assignment questions.

arbitration is often simply an extension of negotiations. It is closer to the parties than a formal administrative proceeding before a board in Washington, and in matters of detail it is likely to be more responsive to their individual needs. Since the representation questions arising under a collective agreement are normally interstitial,[28] the participation of arbitrators will usually supplement rather than derogate from the broader functions of the Board. Indeed, it is the judgment of the Board that they would perform an important service in a period in which the Board's caseload is increasing.[29]

Respondent's primary reason for arguing that the Board must have exclusive jurisdiction is apparently that the Federation will not be bound by the arbitration proceeding. We have already shown that this is not a sufficient reason for denying the courts and arbitrators jurisdiction over disputes concerning work assignments (see pp. 18-21, above). The consideration

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[28] See e.g., *Hughes Tool Co.*, 85 NLRB 663 (should "battery repairman" be included in unit of electricians or unit of production and maintenance employees?); *Radio Station KHQ*, 111 NLRB 874 (should "announcer-technician" be included in unit of announcers or unit of technical employees?); *Levingston Shipbuilding Co.*, 120 NLRB 205 (should toolroom attendants be included in unit of machinists or unit of production and maintenance employees?); *Kennecott Cooper Corp.*, 122 NLRB 198 (should "field lubrication men" be included in unit of machinists or in unit of production and maintenance employees?); *St. Regis Paper Co.*, 130 NLRB 1235 (should employees engaged in maintenance of powerhouse equipment located outside powerhouse be included in unit of maintenance employees or unit of powerhouse employees?); *Kennametal, Inc.*, 132 NLRB 194 (should employees working in laboratory, but allegedly engaged in production work, be included in unit of production employees?).

[29] See, *Twenty-Seventh Annual Report of the National Labor Relations Board*, 1, 3 (G.P.O., 1963).

tions are no different when the controversy is cast in the form of a controversy over the bargaining unit. The inability of parties and arbitrators to fashion, up to now, a satisfactory procedure for bringing into a single proceeding rival unions each holding its own agreement may lessen the value of the arbitration but not to the point at which Congress can be supposed to have excepted it from the general rule favoring the settlement of disputes over the terms of a collective agreement by the method upon which the parties to the contract have agreed.

It may also be that the arbitrator's decision cannot finally resolve the controversy because the union which is not a party to the collective agreement under which the arbitration is conducted may complain to the Board that the employer's compliance with the arbitrator's award has resulted in disregard of the true meaning of the NLRB certification and a consequent violation of Section 8(a)(5). There are two answers to this contention.

First, although the Board, by virtue of Section 10(a) of the Act (see n. 5, p. 10, *supra*) is free to redetermine the question *de novo*, it is not certain that it will or, if it does, that it will come out with a conclusion contrary to that of the arbitrator. Since the arbitrator was obliged to apply federal law in the resolution of the dispute (*Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448), and decisions of the Board constitute part of the relevant body of federal law, the likelihood that the arbitrator may have applied principles inconsistent with those of the Board is minimized. Where the results reached by the arbitrator are not repugnant to the policies of the Act and he arrived at them on the basis of a full and fair

record, it is possible that the Board, following its practice of according deference to the arbitral process (n. 5, p. 10, *supra*), would accept the arbitrator's resolution of the bargaining unit dispute, even though the Federation was not a party thereto.[30]

Second, even should the Board find it necessary to reach a conclusion contrary to that of the arbitrator—and, in that event, the Board's determination would take precedence[31]—we point out that this danger is not confined to controversies over the scope of a bargaining unit.

Arbitrators are commonly required to interpret a contract within the framework imposed by other legal rights and duties. See Cox, *Place of Law in Labor Arbitration*, 34 Chicago Bar Record 205 (1953). An

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[30] Cf. *International Harvester Co.*, 138 NLRB No. 88, 51 LRRM 1155 (arbitrator's ruling that employee was delinquent in dues payments to the union and thus subject to discharge under the union security provision of the contract accepted by the Board even though the employee did not participate in the arbitration proceeding, for Board found that the employee's position had been fully presented by the employer); *Raley's, Inc.*, 143 NLRB No. 40, 53 LRRM 1347 (Board held that contract between employer and another union barred an election sought by petitioning union on the basis of an arbitrator's ruling, rendered in a proceeding in which the petitioning union did not participate, that the contract covered the stores sought to be represented by petitioning union).

[31] Section 10(a) of the NLRA; *Carey* v. *General Electric Co.*, 315 F. 2d 499, 509 (C.A. 2), petition for certiorari pending, No. 114, October Term, 1963; Local 174, *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101, n. 9; *Lodge 12, IAM* v. *Cameron Iron Works*, 257 F. 2d 467, 473 (C.A. 5), certiorari denied, 358 U.S. 880; *Doll & Toy Workers* v. *Metal Polishers*, 180 F. Supp. 280 (S.D. Cal.); *Retail Clerks* v. *Montgomery Ward & Co.*, 50 LRRM 2702 (N.D. Ill.), affirmed 53 LRRM 2069 (C.A. 7); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 Col. L. Rev. 269, 298-300 (1959); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 568-569, 570-572 (1963).

award requiring a discharge pursuant to a union shop agreement might result in unfair labor practice charges under Section 8(a)(3), which, if sustained, would result in nullifying the arbitrator's determination. See *International Harvester Co.*, 138 NLRB No. 88, 51 LRRM 1155; *Hershey Chocolate Corp.*, 129 NLRB 1052; *New Britain Machine Co.*, 116 NLRB 645; *Monsanto Chemical Corp.*, 97 NLRB 517; *Hamilton-Scheu & Walsh Shoe Co.*, 80 NLRB 1496; *Paramount Pictures, Inc.*, 79 NLRB 557; see also *S. S. White Dental Mfg. Co.*, 26 LA 428; *Marlin Rockwell Corp.*, 22 LA 651. An award carrying out a seniority clause might have the same consequence.[32] Nor is the

[32] In *General Electric, supra*, p. 28, one of the grievances, National Docket No. 4557, involves a claim by the union that an employee was entitled to a job in preference to another employee because the latter had lost his seniority under a clause of the contract which provided that employees who left the bargaining unit covered by the contract to work in another unit, and then returned, would retain seniority, except where they were transferred to a unit represented by another union. The district court declined to order arbitration of this grievance on the ground that the seniority clause was violative of Section 8(a)(3) of the NLRA (see *National Labor Relations Board* v. *International Association of Machinists*, 279 F. 2d 761 (C.A. 9), certiorari denied, 364 U.S. 890). The Second Circuit, however, held that the withdrawal of this grievance from arbitration was unjustified. First, the arbitrator might resolve the grievance without reaching the clause. Second, the court pointed out (315 F. 2d at 512):

> if the arbitrator does uphold the union's construction of the seniority provision in question, he might himself decline to fashion an award based upon it for fear that he would encourage a practice banned by the labor act. We cannot construct a framework of legal principles governing arbitration on the theory that the arbitrator is ignorant or oblivious of the pronouncements of the Board and the courts. As another alternative . . . the arbitrator might decide that the second sentence, which arguably discriminates against those anxious to exercise rights protected by the act, is severable and should be discarded but that the union's claim is supportable under the first sentence.

problem confined to the NLRB. After World War II, arbitrators were frequently required to determine whether the seniority clause of a labor contract conflicted with veterans' rights to reemployment under the Selective Service Act.[33] State courts have not infrequently vacated awards on the ground that the arbitrator's decision was contrary to an established State policy.[34]

In the present situation, the lack of absolute finality would seem to be an asset rather than a liability. The arbitration proceedings, as we have shown, may be highly effective not only in resolving the issue between the immediate parties to the contract, but also in precipitating a wider solution including any rival union. Many cases will involve the application of settled criteria, incorporated in the Board's definition of the unit, to refined details better handled in the shop. At the same time, the Board would retain the general overriding authority to correct any serious departure from the national labor policy. The process, of course, involves a risk of duplication and inconsistency that may be unappealing to those who insist upon tidy solutions. Labor relations are seldom tidy, however, especially in the area of inter-union jurisdictional disputes, and it is "implicit in the choice Congress made that 'diversi-

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[33] See *Sullivan Dry Dock & Repair Corp.*, 1 LA 9; *Bell Aircraft Corp.*, 2 LA 22; *Celanese Corp. of America*, 3 LA 765; *Goodyear Tire & Rubber Co.*, 6 LA 924; *Eastern Stainless Steel Corp.*, 7 LA 267; *Adohr Milk Farms*, 8 LA 459.

[34] *Black* v. *Cutter Laboratories*, 43 Cal. 2d 788, 278 P. 2d 905, certiorari dismissed, 351 U.S. 292; *Matter of Western Union Tel. Co.*, 299 NY 177, 86 N.E. 2d 162; *Avco Corp.* v. *Preteska*, 22 Conn. Sup. 475, 174 A. 2d 684; *Smith* v. *Gladney*, 128 Tex. 354, 98 S.W. 2d 351; see also, *Local 453, IUE* v. *Otis Elevator Co.*, 314 F. 2d 25 (C.A. 2).

ties and conflicts' may occur," *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 514.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed.

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AUGUST 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the repre-

sentative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting

commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

* * * * *

TITLE III—SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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